Neutral Citation Number: **[2022] EWHC 223 (Ch)**

Case Number **CR-2017-003729**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
IN THE MATTER OF PARAGON OFFSHORE PLC (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 7 February 2022

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

B E T W E E N :

MICHAEL R. HAMMERSLEY

Applicant

And

(1) NICHOLAS GUY EDWARDS

(2) DAVID PHILIP SODEN
(The Joint Liquidators of Paragon Offshore PLC (in liquidation)
(3) PARAGON OFFSHORE LIMITED

Respondents

Mr Mark Arnold QC (instructed by Weil, Gotshal & Manges (London) LLP) for the First and Second Respondents
Mr Henry Phillips (instructed by Skadden, Arps, Meagher & Flom (UK) LLP**)** for the Third Respondent
Mr Michael Hammersley, acting in person

Hearing date: 10 and 20 September 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 7 February 2022 at 10:30am.

Introduction

1. On 13 August 2021, I handed down the judgment on the application to dismiss the 'Revised Rule 14.11' Application issued pursuant to the Insolvency Rules 2016 ('the Dismissal Judgment') by Mr Hammersley. As the hand down was to be without any attendance, I made an order dismissing the Revised Rule 14.11 Application, but adjourning the hearing to enable any party wishing to apply for an order and/or consequential directions on the Dismissal Judgment to do so. As is apparent, I was keen to ensure that in so far as Mr Hammersley sought permission to appeal, his entitlement to do so before me was preserved to a date when all parties could attend, if so advised. The reference to consequentials in the order allowed other applications to be made before me. The most obvious one was of course an application relating to costs. However, on 6 September 2021, Mr Hammersley issued a further application ('the Consequential Application') seeking more substantial relief as part of the hand down of the dismissal judgment.

2. On 10 September 2021 and on 20 September 2021 I heard numerous applications relating to the dismissal judgment. This is the judgment relating to the following matters:-

(1) whether I should make a declaration that the Revised Rule 14.11 Application was totally without merit;

(2) in so far as I accede to (1), should I make a limited civil restraint order against Mr Hammersley;

(3) the application by Mr Hammersley seeking permission to rely upon further evidence in support of his Revised Rule 14.11 Application ('the Late Evidence Application') and in particular his summary judgment application which had been issued on 10 March 2021 but not determined at the hearing of the Revised Rule 14.1

Application. The Late Evidence Application was issued on 15 July 2021, after I had heard the Revised Rule 14.11 Application and had reserved judgment; and
(4) the application made by Mr Hammersley seeking permission to appeal the Dismissal Judgment.

3. In my Dismissal Judgment dated 13 August 2021, for the reasons set out in that judgment, I acceded to the dismissal application of the Joint Liquidators. Accordingly, it seemed to me that the application for summary judgment which had been issued by Mr Hammersley would need to be dismissed. Having determined that there was no merit in the Revised Rule 14.11 Application, it is difficult to see what part of the summary judgment application could be argued before me. Accordingly, I dismissed the summary judgment application by an order dated 20 September 2021. On 20 September 2021, I also made an order for costs against Mr Hammersley in relation to the dismissal application and summarily assessed those costs. On 20 September 2021, I also directed that the hand down of this judgment be listed for half a day so as to enable there to be sufficient time to deal with the consequential application which Mr Hammersley had issued shortly prior to the hearing on 10 September 2021.

4. After I had reserved judgment on the four issues I heard on 10 and 20 September 2021, Mr Hammersley issued a further application on 25 October 2021, being a 'review and communications' application (the 'Review and Communications Application'). In an email dated 15 November 2021 from Messrs Weil, solicitors acting on behalf of the Joint Liquidators, Ms Brady of Messrs Weil proposed that I extend the time estimate for the hearing of the hand down of this judgment to enable this latest application by Mr Hammersley to be dealt with. She also indicated that the Joint Liquidators will make an application seeking to have this latest application dismissed. That email was copied to Mr Hammersley. I have not seen a reply from him, but I consider this a sensible suggestion and accordingly, the hand down should be listed for a day before me and suitable directions agreed so that this latest application is treated as before me on that day alongside the other matters.

5. I will not lengthen this judgment by summarising what is set out in the Dismissal Judgment, but reference needs to be made to that judgment in relation to the background, the application and the history of the case. No summary of the

background is set out in this judgment so it needs to be read alongside the dismissal judgment. For the purposes of this judgment, I will briefly set out the chronology of the various applications made and judgments which I have handed down. On 20 July 2020, I handed down my judgment acceding to the discharge application of the Former Joint Administrators (thereafter referred to as the Joint Liquidators) pursuant to paragraph 98 of Schedule B1 of the Insolvency Act 1986 and dismissing the objections to the discharge raised and argued by Mr Hammersley, a shareholder of the company Paragon Offshore PLC (in liquidation)('Paragon Parent')('the Discharge Judgment'). On 19 October 2020, I handed down my judgment summarily dismissing the application ('the Review Application') made by Mr Hammersley seeking to review, vary and/or set aside the Discharge Judgment. After hearing submissions including those made by Mr Hammersley against such a declaration, I thereafter declared that the Review Application was wholly without merit.

6. The rule 14.11 application thereafter issued by Mr Hammersley was amended with my permission on 18 January 2021. During the course of the hearing before me, the application was referred to as the revised rule 14.11 application although the amendments which I granted were in line with effectively a wholesale change on the application itself. After hearing the dismissal application issued by the Joint Liquidators, I acceded to that application and dismissed the Revised Rule 14.11 Application.

7. Before me on 10 September 2021 and on 20 September 2021, I heard submissions on the issues I have identified above. Mr Arnold, acting on behalf of the Joint Liquidators, made his submissions in respect of the four issues. The various applications made by the Joint Liquidators were supported by Mr Phillips on behalf of Paragon Offshore Limited ('New Paragon'). I extend my thanks to Mr Phillips who kept his submissions short and avoided any duplication with Mr Arnold. Mr Hammersley also made his submissions and I must also extend my thanks to him for keeping his submissions focussed on the issues I needed to determine.

Was the Revised Rule 14.11 Application totally without merit?

8. The starting point provided to me by Mr Hammersley, to which there was no disagreement, is that an application which has failed does not equate necessarily to it

being totally without merit. I agree. The principles for what is meant by totally without merit are set out in the notes to CPR 23.12. I do not need to go further than setting out the summary, as Mr Hammersley did not oppose the summary, which Mr Arnold referred to. CPR 23.12 states that if an application is dismissed, and the Court considers that it is totally without merit, then the Court's order must record that fact and the Court must also at the same time consider whether it is appropriate to make a civil restraint order (a CRO). As is made clear in the notes in the White Book, the questions of (1) whether the Court should record a finding of totally without merit and (2) whether it is appropriate to make a CRO are distinct and raise different considerations. I will deal with them in two different parts of this judgment.

9. An application totally without merit is one which has no reasonable prospect of success or was 'bound to fail'. The latter is held to mean that 'no rational argument was or could have been raised in support of it'. It is not necessary that the application is held to be abusive or vexatious. Mr Arnold did not seek to submit before me that Mr Hammersley's actions were abusive or vexatious, but reserved his position on that point. In summary, Mr Arnold relies upon the following in support of his argument:-

(1) The revised rule 14.11 application related to matters and issues which had already been dealt with in previous judgments where in each one Mr Hammersley was unsuccessful;

(2) Mr Hammersley persisted in his claim that Paragon Parent had no direct or personal liability to financial creditors under the finance documents. These documents had been considered previously by the Court and the determination had been made previously that Paragon Parent was directly liable to finance creditors either as a debtor or as a guarantor. Therefore, the very foundation of Mr Hammersley's application was 'doomed to fail';

(3) there was no merit in Mr Hammersley's argument relating to the Loan Note Instrument ('the Instrument'). The terms of the Instrument were clear and consistent with the US Chapter 11 Fifth Plan and the UK Implementation Agreement. Mr Hammersley's argument that the Instrument reflected an assignment of the financial creditors' deficiency claims was clearly inconsistent with the clear and unambiguous terms of the Instrument;

(4) the Court had determined that Mr Hammersley's objection to the Instrument on the basis that it constituted a 'proof of debt' was also misconceived; and

(5) In conclusion, the Court had concluded that the revised rule 14.11 application was without merit and had no prospect of success.

10. By the Revised Rule 14.11 Application, Mr Hamersley sought an order excluding the Instrument held by New Paragon and certain consequential relief. As I had determined after a consideration of the financial documents, the US Chapter 11 Fifth Plan, the UK Implementation Agreement as well as the Instrument, those relevant documents were essentially part of the mechanics for carrying out what was set out and actioned by the US Chapter 11 Fifth Plan as well as the UK Implementation Agreement. The Instrument consolidated certain inter company balances in the sum of US$500 million, liability for which was assumed by Paragon Parent in favour of New Paragon. This was in accordance with the US Chapter 11 Fifth Plan.

11. Mr Hammersley's application was based on a construction of the finance documents, including ultimately the Instrument. He submitted that the finance documents established that Paragon Parent did not have personal liability for the claims of the financial creditors and that those claims were, submitted Mr Hammersley, 'non recourse'. Mr Hammersley then sought to submit that as non recourse claims, these were, under the US Bankruptcy Code, 'deficiency claims' such that those creditors had recourse to Paragon Parent. He submitted that the Instrument represented these deficiency claims, and as the deficiency claims were expressly extinguished by the terms of the US Chapter 11 Fifth Plan, the Instrument must be disallowed. In order to have any prospect of succeeding, Mr Hammersley needed to have a viable case on the construction of the finance documents. He needed to be able to establish that Paragon Parent did not have personal liability, either directly as a debtor or as a guarantor.

12. As submitted by Mr Arnold, the clear wording of the finance documents made this argument of Mr Hammersley, unsustainable. As I set out in my dismissal judgment, by reason of the clear and unambiguous terms of the finance documents, Mr Hammersley's construction argument failed in its entirety before me. Mr Arnold also observed that this was not the first time that I had considered in detail the terms of the finance documents. As is set out in the Discharge Judgment, I had considered

the terms of the finance documents as part of Mr Hammersley's argument that effectively Paragon Parent was not insolvent at the time that it was placed into administration by order of Mrs Justice Rose (as she then was). I considered the same finance documents in the revised rule 14.11 hearing. Mr Hammersley had sought to argue before me that Paragon Parent was not liable under these finance documents such that Paragon Parent was therefore not insolvent at the time that it was placed into administration. As set out in the Dismissal Judgment, I held that the construction Mr Hammersley sought to place on the meaning of 'Excluded Assets' was not only strained but also contrary to and contradicted by other provisions in the relevant finance document (see paragraphs 22 and 23 of the Dismissal Judgment). I also held that Paragon Parent was clearly primarily liable under the unsecured Senior Notes and that Mr Hammersley's argument to the contrary was unsustainable (paragraph 24 of the Dismissal Judgment). I also noted in my judgment that Mr Hammersley had already raised the same arguments in the US Bankruptcy proceedings where it was rejected by both the US Bankruptcy Court and the US District Court (paragraphs 26-27 of the dismissal judgment).

13. Mr Hammersley submits that the arguments made at the earlier hearing were different. In the Discharge Judgment, I considered his argument that Paragon Parent was not insolvent because, as Mr Hammersley submitted, it was not liable under certain of the finance documents. In my judgment, the argument raised before me in the revised rule 14.11 was essentially the same. Mr Hammersley was submitting in the Revised Rule 14.11 Application that there was no direct liability under the finance documents of Paragon Parent to the finance creditors. That, to my mind, is essentially the same argument that the liabilities of Paragon Parent are much smaller than set out in the evidence filed in the discharge application as well as set out in the documents themselves. This in itself does not make the application wholly without merit. However, in my judgment the difficulty for Mr Hammersley is that his arguments relating to liability or otherwise under the terms of the finance documents had already been considered by me and I had held against him. He was aware that my earlier judgment meant that the liabilities of Paragon Parent under the terms of the finance documents, including the guaranteed liabilities were such that it had been determined that there was no such restriction or exclusion on those liabilities as he was seeking to argue under his Revised Rule 14.11 Application. Mr Hammersley sought to argue that

'reasonable minds can disagree' and accordingly this was not a totally without merit argument of his, merely a different view to mine.

14. However, the terms of the finance documents are clear and unambiguous. To my mind, this means that an argument seeking to place a different interpretation which really strains or is entirely inconsistent with the express and clear terms of the relevant documents results in an application which is bound to fail. The fact that Mr Hammersley had already sought to argue that the finance documents in some way restricted the indebtedness whether directly or by way of guarantee and failed merely demonstrates that he was well aware of the outcome of his application. There are of course cases where a construction of a document is found against a party but that does not in itself mean the case was doomed to fail. That was the argument Mr Hammersley raised before me on this application. Here, the terms of the finance documents were such, as I have set out in my judgment, that the arguments of Mr Hammersley were in my judgment bound to fail. There was only one possible construction of these documents under their very clear terms. As I set out in my judgment, his construction was unsustainable.

15. Once it is clear that Mr Hammersley failed in his non recourse argument (based on his doomed construction argument of the finance documents) then, in my judgment, the rest of his application was also doomed to fail. As is set out in my dismissal judgment, the terms of the Instrument are clear and unambiguous. As I held in my Dismissal Judgment, its terms do not reflect an assignment of the financial creditors' deficiency claims. In any event, I had already determined that on a construction of the finance documents, Paragon Parent was liable for these claims so therefore they were not 'non recourse'. Equally, as I set out in my Dismissal Judgment, the Instrument cannot constitute a proof of debt. The Revised Rule 14.11 Application was without merit. As I have set out above, it was, in my judgment, bound to fail. In all those circumstances, I declare that that it was totally without merit.

The Late Evidence Application

16. Before turning to the issue of a limited civil restraint order, I will deal with the Late Evidence Application of Mr Hammersley. This was filed by him after I had

reserved judgment on the dismissal application of the Joint Liquidators. The late evidence is said to be in support of the summary judgment application. At the hearing of the Dismissal Application, I directed that the summary judgment application of Mr Hammersley be heard, in so far as necessary, after the hearing and the determination of the Dismissal Application. If I acceded to the Dismissal Application, then the summary judgment application would fall to be dismissed. If I had not granted the Dismissal Application, then the issue of the summary judgment application would have needed to be considered. As the summary judgment application has been dismissed by me on 20 September 2021, then it seems that the Late Evidence Application should follow the same fate. As Mr Arnold observed, once the Joint Liquidators were successful in their Dismissal Application, the summary judgment application essentially would have to be dismissed because the application itself had been dismissed. I agree.

17. Mr Hammersley submitted that he made the Late Evidence Application because at that stage the judgment relating to the Dismissal Application had not been handed down, so he could not make a review application. He submitted that the Late Evidence Application was issued to ensure that the Court did not issue an erroneous judgment. He raised more precedent in his Late Evidence Application and numerous other documentation. It appears that Mr Hammersley sought to obtain permission to rely on the Late Evidence Application as part of his evidence and submissions in relation to the Dismissal Application despite the fact that the hearing had terminated and judgment had been reserved at least a month earlier. After I reserved judgment at the end of the Dismissal Application hearing, Mr Hammersley's Late Evidence Application was issued in support of his summary judgment application. I determined that it would be listed at this hand down hearing. There was at that stage no application seeking to review my decision (which had not at that stage been handed down). In so far as Mr Hammersley disagrees with the Dismissal Judgment, then he has the option to seek permission to appeal. This is what he has done and I will deal with that later. Equally, he is aware that in exceptional cases, the review jurisdiction may be open to him. This is not to be taken as being in any way as any endorsement that exceptional circumstances exist in this case or that such an application has merit. In my judgment, the Late Evidence Application serves no purpose in relation to the matters which are before me and relate to the dismissal application. I do not consider

that there is any application before me seeking a review of my Dismissal Judgment and therefore I am not prepared to consider evidence filed in anticipation of any such application. Again, I should add that in so as far as I have considered the evidence, none of the proposed late evidence has, in my judgment, any bearing on the matters which I have dealt with in the Dismissal Judgment. I dismiss the late evidence application.

The application for a limited civil restraint order

18. Pursuant to CPR 23.12, if a Court declares that an application is totally without merit, then it has to consider whether to make a civil restraint order. The Joint Liquidators invite me to make a limited civil restraint order. Mr Hammersley was notified by letter dated 27 August 2021 that the Joint Liquidators intended to make this application for a limited civil restraint order. I heard submissions from both Mr Hammersley and Mr Arnold on this issue. I should add that Mr Phillips supported the submission made by Mr Arnold. As I have already set out above, the making of a declaration by this Court that an application is totally without merit does not in itself mean that a civil restraint order should be made. One does not automatically follow when a Court has determined that an application is totally without merit. CPR 23.12(b) states that at the same time as the Court determines that an application is dismissed as being totally without merit, then it must consider whether it is appropriate to make a civil restraint order.

19. Practice Direction 3C provides that a limited civil restraint order may be made by a judge of any court where a party has made two or more applications which are totally without merit (Practice Direction 3C paragraph 2.1). The reference to Judge in this provision clearly encompasses an ICC or Deputy ICC Judge. The Joint Liquidators rely upon the declaration I made in relation to the review application (19 October 2020) to be totally without merit as well as the current one where I have now declared that the Revised Rule 14.11 Application is also totally without merit. Mr Arnold submits that therefore the threshold requirements for making a limited civil restraint order are met as there are two applications in the same proceedings which have been declared as being totally without merit.

20. There was one matter which arose from the wording of paragraph 2.1 which states, 'A limited civil restraint order may be made by a judge of any court where a party has made 2 or more applications which are totally without merit' In the Insolvency and Companies Court jurisdiction, the number given to proceedings is in practice somewhat a matter of convenience. All applications which have been made by Mr Hammersley are given the same number as the number given to the original application to the Court seeking an administration order. I need to satisfy myself that the two applications made by Mr Hammersley which have been declared by me as being totally without merit arise under the same proceedings. The review application related to an application made seeking to review, vary or set aside the order made discharging the former administrators pursuant to paragraph 98 of schedule B1. The Revised Rule 14.11 Application seeks a rejection of the Instrument and seeks a direction that the Joint Liquidators (who are now the relevant office holders of Paragon Parent) cause a distribution to be made to the shareholders. In my judgment, both these applications do relate to the same proceedings. They both relate to the insolvency process which commenced with the administration and also relate to the conduct of the relevant insolvency proceedings. Accordingly, I am satisfied that the jurisdictional requirements have been met.

21. The applications made by Mr Hammersley have occupied a considerable amount of Court time in these proceedings. His applications have been accompanied by lengthy witness statements and exhibits. In many instances the material submitted by him is irrelevant to the issues which needed to be determined, but still needed to be read by the other parties as well as the Court. The current office holders have had to expend considerable costs in dealing with these applications. Even after this application was made, Mr Hammersley issued further applications in these proceedings which will need to be dealt with. At the date of handing down this judgment, I will have two further applications to deal with, being the Consequentials Application issued by Mr Hammersley shortly before the hand down of the Dismissal Judgment and the more recent Review and Communications Application. Mr Arnold submits when the history of these applications is considered, this case has effectively been allocated a disproportionate amount of the Court's resources. I agree. The level of Court resources on this case inevitably has reduced what can be allocated to other cases. I also agree that this is an important factor for me to take into account. Mr

Arnold also refers to the fact that in the applications, the same arguments are made by Mr Hammersley. Although Mr Hamersley disagrees with this characterisation, I agree with Mr Arnold. In the hearings before me, Mr Hammersley has sought to rely on the same arguments, sometimes accompanied by further voluminous documents, US case law and US law. I have been left in many instances with the impression that effectively Mr Hammersley is seeking to re litigate points found against him until he obtains, he hopes, the result he wants.

22. It is clear from the fact that Mrs Justice Rose made an administration order (to which there has been no appeal) that Paragon Parent was insolvent. Mr Hammersley challenged this in the US Courts and lost. In this jurisdiction, he was effectively inviting me to look behind the order made by Mrs Justice Rose to determine that the Paragon Parent was solvent at the time. I had to consider carefully all the finance documents because Mr Hammersley sought to argue that these did not create a direct or a guarantor liability upon Paragon Parent. He lost these points before me as he had lost them it in the US Courts. Nevertheless, he then sought to review my decision. He lost that on a summary dismissal on the grounds that the review application lacked merit. The Revised Rule 14.11 Application covered, as I have held above, the same grounds, being whether the finance documents created direct or guarantee liabilities on Paragon Parent. I accept that Mr Hammersley sought to raise other arguments, but unless he was able to persuade me on the construction point relating to the finance documents, his application was bound to fail. In fact, I held it was bound to fail in any event because the construction of the documents was so clearly against him for the reasons set out in the dismissal judgment. I had already considered the construction of the finance documents at a much earlier hearing.

23. Mr Hammersley objects to the making of a limited civil restraint order. He states that it is a draconian order and that the bar is very high. He says it can only be made when it is vexatious, abuse or there is a refusal to take no for an answer. He seeks to argue that the earlier totally without merit declaration in relation to the review application was made in different proceedings. On this last point, I have carefully analysed the applications made and I am satisfied that both of them have been made in the same proceedings. I do not accept that the revised rule 14.11 is in some way other proceedings. It arises out of the administration and this is clear on any

view of the argument raised by Mr Hammersley and his attempt to seek relief from this Court by rejecting in some way the Instrument. Mr Hammersley states that his challenges to the Instrument are done. He says he is not certain what other applications he would make. In my judgment, this is exactly a case where Mr Hammersley is refusing to take no for an answer.

24. In my judgment, this is an appropriate case for making a limited civil restraint order. As I have indicated above, I agree with the points raised by Mr Arnold. On the facts which I have set out above, this is exactly the type of case where any future applications should be brought before the Court before they can be issued and pursued by Mr Hammersley. This will enable the Court to consider the issue of resources and merits in relation to any further applications made.

Permission to appeal

25. I heard the application by Mr Hammersley seeking permission to appeal the Discharge Judgment. Mr Arnold and Mr Phillips replied to these submissions. I have decided to refuse permission to appeal. In order to facilitate any further application by Mr Hammersley, I have set out my reasons on the usual form which accompanies this judgment rather than set them out in this judgment. I hope that will facilitate the task of any Judge who needs to consider this matter. I should add that the reference I have made to any further application for permission to appeal should not be taken as my having considered that there is any merit in such an application. I consider there is no merit, which is clear from what I have set out above and the accompanying form.